SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 436.

THE UNITED STATES, APPELLANT,

vs.

EDWIN E. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

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1 I.—*Petition. Filed October 25, 1906.*

In the Court of Claims.

EDWIN E. MARVIN
vs.
THE UNITED STATES. } No. 29845.

To the honorable judges of the Court of Claims:

Your petitioner, Edwin E. Marvin, a citizen of the United States, and a resident of Hartford, in the State of Connecticut, respectfully shows:

That from the 1st day of June, 1900, to the 1st day of April, 1906, he was clerk of the United Staes District and Circuit Courts for the district of Connecticut, duly qualified, and acted as said clerk.

That your petitioner presented to the accounting officers of the Treasury for payment his accounts for services as said clerk from the 1st day of June, 1900, to the 1st day of April, 1906, sworn to

2 and duly approved by the court, as required by the act of February 22, 1875, 18 Stat. L., 333; that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit "A," herewith attached.

Petitioner claims that, in accordance with the provisions of section 828 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid, and approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment of said fees, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court in accordance with law.

Your petitioner further avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation, if said fees were added, would not exceed the maximum compensation of $7,000 for any one year.

Wherefore your petitioner prays judgment against the defendant for $535\frac{00}{100}$.

EDWIN E. MARVIN.

By his attorneys,
LANCASTER & SMITH,
Washington, D. C.

3 EXHIBIT A.

The United States, Dr. To Edwin E. Marvin, clerk of the District and Circuit Courts of the United States for the district of Connecticut, for services rendered on behalf of the United States from June 1, 1900, to April 1, 1906, to wit:

Item 1.—For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by sections 574, 638, and 828, Revised Statutes, and chapter 11, section 2, bankruptcy act (30 Stat. L., 545), 107 days, at $5.00 per day, disallowed per official settlements of the accounting officers of the Treasury Department, dated July 3, 1906, as follows:

Report 119648, item 1	$535.00
Total amount claimed	$535.00

4 DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me, this 23rd day of October, 1906.

[SEAL.] NORTON M. LITTLE,
Notary Public, D. C.

5 (Indorsed:) Court of Claims. No. . Edwin E. Marvin vs. The United States. Copy petition. Filed Oct. 25, 1906. Court of Claims.

6 II.—*Traverse. Filed April 15, 1908.*

In the Court of Claims of the United States. December term, A. D. 1907.

EDWIN E. MARVIN
vs.
THE UNITED STATES. } No. 29845.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each

and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

7 III.—*Argument and submission.*

On the 15th day of April, 1908, this case was argued by Mr. C. C. Lancaster, for the claimant, and Mr. P. M. Ashford, for the defendants, and the case was thereupon submitted.

8 IV.—*Findings of fact and conclusion of law. Filed April 20, 1908.*

Court of Claims of the United States.

EDWIN E. MARVIN
vs.
THE UNITED STATES. } No. 29845.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

During the times hereinafter mentioned the claimant, Edwin E. Marvin, was clerk of the District and Circuit Courts of the United States for the District of Connecticut.

II.

For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts duly verified, and presented the same to the United States Court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney-General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in Finding III was refused.

III.

Said items the payment of which was so refused were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at $5 per day, making $535.

The business so transacted was the reference by the clerk to
9 the referee of voluntary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders or decrees were received from the judge sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which per diems are claimed. The claimant, after learning of the decision of the Court of Claims in the Owen case (41 C. Cls. R., 69), went back in his district court journal and on the last day of every month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that, under the Owen case (41 C. Cls. R., 69), and the Finnell case (185 U. S., 236), the claimant is entitled to a judgment for five hundred and thirty-five dollars ($535).

BY THE COURT.

10 V.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 20th day of April, A. D. 1908, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said Edwin E. Marvin, do have and recover of and from the United States the sum of five hundred and thirty-five dollars ($535).

BY THE COURT.

11 VI.—*Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 20th day of April, 1908, in favor of claimant, the defendants, by their Attorney-General, on the 9th day of June, 1908, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.

Filed June 9, 1908.

Ordered, This 9th day of June, 1908, that the above application for appeal be allowed as prayed for.

STANTON J. PEELLE,
Chief Justice.

12 **VII.—*Certificate.***

Court of Claims.

EDWIN E. MARVIN
vs.
THE UNITED STATES. } No. 29845.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application of the defendants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 13th day of June, A. D. 1908.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

13 (Indorsement on cover:) File No., 21232. Court of Claims. Term No., 436. The United States, appellant, vs. Edwin E. Marvin. Filed June 17th, 1908. File No., 21232.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, APPELLANT,
v.
EDWIN E. MARVIN.
No. 436.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellee, Edwin E. Marvin, was clerk of the United States District and Circuit Courts for the District of Connecticut from the 1st day of June, 1900, to the 1st day of April, 1906. Within this period he referred voluntary petitions in bankruptcy to a referee in bankruptcy on each of one hundred and seven days. The business transacted in the performance of the foregoing services was merely the reference by the clerk to the referee of certain voluntary petitions in bankruptcy, which were filed during the absence of the judge from the district. No written orders to be entered

were received by the appellee from the judge, nor were any written orders received by the clerk or issued by the judge directing that court be open on any of said one hundred and seven days. Neither does the journal of the court show, as a matter of fact, that court was open on any of said days. After appellee had been informed of the decision of the Court of Claims in the case of *Owen* v. *The United States* (41 C. Cls. Rep., p. 69) he interlined the journal of the court so as to show the days on which he had made references of voluntary petitions in bankruptcy, merely stating that on said days "court business in bankruptcy proceedings was transacted." Appellee then rendered a supplemental account charging a per diem fee at the rate of $5 per day for said services as follows:

> For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by sections 574, 638, and 828, Revised Statutes, and chapter 2, section 2, bankruptcy act. (30 Stat. L., 545.)

The foregoing supplemental account was approved by the court as required by the act of February 26, 1905 (18 Stat. L., 333), and presented to the Attorney-General for examination and to the Auditor for the State and other Departments for audit, as required by law, and the same was disallowed and payment refused.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment in favor of the appellee and against the appellants on the findings of fact, as found in record pages 3 and 4.

ARGUMENT.

The bankruptcy act of July 1, 1898, section 18, par. "g" (30 Stat. L., p. 551), provides as follows:

> Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. *If the judge is absent from the district or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.*

The judge was absent from the district when the petitions in bankruptcy were filed. The clerk was therefore required by the statute to "forthwith" refer said petitions to the proper referee. The performance of this service certainly does not constitute "business actually transacted in court" within the meaning of the decision of this court in the case of Finnell (185 U. S., 236), which case appears to have constituted a part of the ground upon which the Court of Claims rested its decision in the case at bar.

In the Finnell case the clerk of the district and circuit courts of the United States for the District of Kentucky entered certain orders, decrees, and other proceedings of the court when none of the

judges of said court were personally present at the time of the entry of such orders and other proceedings, but the same were transmitted to the clerk by mail by the different judges composing the courts of said district. The business was not proceedings in bankruptcy, but consisted of such orders as granting time to plead, directing drawing of jury, restraining orders, orders disposing of sundry demurrers and motions, granting rule, application for writ of certiorari, orders approving report of receivers, orders and final decrees disposing of certain cases, and other sundry entries of orders set forth in the record.

In the *Owen case* (*supra*), the facts as found by the Court of Claims show that the claimant asked for compensation for certain days in which bankruptcy business was transacted, and the business was actually transacted by the judge sitting in chambers. The court below in the Owen case based its judgment in favor of the claimant upon the *Finnell case* (*supra*), from which judgment no appeal was taken. In the case at bar the court rendered judgment in favor of the appellee on the authority of the Finnell and Owen cases. We do not think the facts in this case bring it within the decision of either of the foregoing cases. In the Finnell case, as we have seen, the business was ordered to be entered by the judges, and, in the language of the court, "constituted business actually transacted in court." In the Owen case, as may be seen, bankruptcy business was *actually*

transacted by the judge in chambers, and the court journal showed that the court was opened and closed in due form, and that the business so transacted in chambers was duly entered on the journal of the court.

In the case at bar the business transacted was reference by the clerk of voluntary petitions in bankruptcy which were filed during the *absence of the judge from the district* and without his knowledge or intervention in any form or manner whatever. The journal made by the claimant does not show that the court was open on any of the days for which per diems are claimed. Appellee, after learning of the decision of the Court of Claims in the *Owen case* (*supra*), went back in his district court journal and on the last day of every month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted. (Record, p. 4.)

In the light of these facts, we submit that appellee is not entitled to the fee claimed for "attendance on court." We ask that the judgment of the court below be reversed and the cause remanded with instructions to dismiss the petition.

JOHN Q. THOMPSON,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, APPELLANT,
v.
EDWIN E. MARVIN. } No. 436.

Appeal from the Court of Claims.

APPELLANT'S SUPPLEMENTAL BRIEF.

This brief is filed for the purpose of calling the court's attention to what we believe to be the improper inclusion of the order of the court approving the account in the appellee's statement of facts. (Brief for appellee, p. 3.)

The validity of the judgment entered by the Court of Claims is to be determined by the facts found by that court. The evidence before the Court of Claims, of which the order of approval set forth in appellee's brief is only a part, is not before this court, and all reference to it, or statements as to what it may prove or disprove, is entirely improper.

The sentence of said order of approval in italics is in the nature of a statement of a conclusion of law. Whether "the court was open for business and court

business transacted," under the facts as set forth in finding 3 (Transcript of record, pp. 3 and 4), is the very question raised by this appeal.

In answer to counsel's contention as to the effect of the approval of the District Court (Brief, pp. 7 and 8), it is only necessary to cite *McMullen* v. *United States* (146 U. S., 360, 362).

JOHN Q. THOMPSON,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Attorney.

O

Office Supreme Court, U. S.
FILED.
DEC 31 1908
JAMES H. McKENNEY,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 436.

THE UNITED STATES, APPELLANT,

vs.

EDWIN E. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 436.

THE UNITED STATES, APPELLANT,

vs.

EDWIN E. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Fees of a Clerk of the District Court of the United States for the District of Connecticut.

The facts as found by the court below are as follows:

COURT OF CLAIMS OF THE UNITED STATES.

No. 29845.

EDWIN E. MARVIN

vs.

THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

During the times hereinafter mentioned the claimant, Edwin E. Marvin, was clerk of the District and Circuit Courts of the United States for the District of Connecticut.

II.

For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts, duly verified, and presented the same to the United States Court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney-General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in Finding III was refused.

III.

Said items, the payment of which was so refused, were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at $5 per day, making $535.

The business so transacted was the reference by the clerk to the referee of voluntary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders, or decrees were received from the judge sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which per diems were claimed. The claimant, after learning of the decision of the Court of Claims in the Owen case (41 C. Cls. R., 69), went back to his district court journal, and on the last day of every

month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that under the Owen case (41 C. Cls. R., 69) and the Finnell case (185 U. S., 236) the claimant is entitled to a judgment for five hundred and thirty-five dollars ($535).

BY THE COURT.

The order of court approving the account referred to in Finding II was as follows:

"At a stated term of the Circuit Court of the United States for the District of Connecticut, held at Hartford, within and for said district, on the 4th day of June, A. D. 1906.

"Present: Hon. James P. Platt, district judge.

"Whereas E. E. Marvin, clerk of the United States District Court for the District of Connecticut, has rendered to this court an account for his official services from the 1st day of June, 1900, to the 1st day of April, 1906, in the presence of the district attorney, and has by his oath attached to the account proved to the satisfaction of the court that the services therein charged have been actually and necessarily performed as therein stated; and whereas said charges appear to be just and according to law, it is hereby ordered that said account, amounting to five hundred and seventy dollars ($570), be and the same hereby is approved for audit. *It is hereby certified that upon each day for which a per diem is charged in this account the court was opened for business and court business transacted in bankruptcy matters as stated.*

"Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, at Hartford, in said district, this 4th day of June, A. D. 1906.

"[SEAL.] R. F. CARROLL,
"Dep. Clerk."

A certified copy of this order attached to the account of claimant is on file in the Court of Claims.

ARGUMENT.

The services performed by the appellee were authorized by section 18, paragraph *g*, of the bankruptcy act (30 Stats., 551), which provides as follows:

"*g*. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

On the days for which a per diem is claimed the business transacted was the making and entering of orders of reference of bankruptcy petitions to the different referees in the district when the judge of the court was absent from the district, on Form No. 15, prescribed by the Supreme Court under section 30 for proceedings under section 18, paragraphs *f* and *g*, of the bankruptcy act, which form is as follows:

(Form No. 15.)

Order of Reference in Judge's Absence.

In the District Court of the United States for the District of Connecticut.

In the Matter of —— ——. In Bankruptcy.

Whereas on the — day of ——, A. D. 190–, a petition was filed to have —— ——, of ——, in the county of —— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition; it is thereupon

Ordered that the said matter be referred to one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the — day of ——, A. D. 190–, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the — day of ——, A. D. 190–.

[SEAL OF THE COURT.] —— ——, *Clerk.*

Appellant's objection is that the journal does not show that the court was open on the days claimed, that the judge was not present, that no orders or decrees were received from the judge to be entered, and that all the claimant did was to refer voluntary petitions in bankruptcy to a referee as directed by the bankruptcy act (30 Stats., 551), section 18, paragraph *g*.

The answer to these objections is clear and conclusive both in fact and law.

In the first place, the Supreme Court in the Finnell case (185 U. S., 236), and the Court of Claims in the Owen case (41 Ct. Cls., 69), decided that the court is always open for the transaction of business under sections 574 and 828, Revised Statutes, and section 2 of the bankrupt act (30 Stats., 545), and therefore it was not necessary for the clerk to make any entry of the opening and adjourning of court on the days claimed.

As a conclusive fact, and to set at rest any doubt as to whether the court was open and bankruptcy business transacted on the days claimed, the judge of the court in the order approving the account of claimant certifies as follows:

"It is hereby certified that upon each day for which a per diem is charged in this account, the court was opened for business and court business transacted in bankruptcy matters as stated."

U. S. *vs.* Jones, 134 U. S., 483.

In Butler *vs.* U. S., 87 Fed. Rep., 658, where a similar question was under consideration, Judge Baker decided as follows:

"Chancery, admiralty, and bankruptcy courts are in session during these regular and special terms, and they also sit, and therefore are in session whenever and wherever the judicial business which is described in sections 574, 638 and 4973 of the Revised Statutes, and in section 16, act Feb. 4, 1887, is actually transacted by one or more of the judges of these courts. In all of these cases, when a court is in session during a regular or special term, or *when it is in session by*

reason of the transaction of business under the sections aforesaid, it is equally necessary that its clerk should be in attendance upon it, with its records at the place where the records are kept by him, to receive the orders, decrees and rules of the court, and its instructions concerning them. If no business were transacted at a regular or special term, his attendance would be necessary; *and it is always necessary when business is transacted in or by the court.*"

In the same case, page 663, in reviewing the jurisdiction and powers of the District Court under section 574 and others, the judge said:

"A review of the decisions and text-books discloses that, under a constitution which vests the judicial power in courts, it cannot be vested by the legislature anywhere else; that, where an exercise of judicial power by a judge is authorized by the legislature, it is held to have meant the court of which he is a judge; that his acts and proceedings in such a case are the acts and proceedings of the court itself; that the business which is transacted by him is actually transacted in court. It also appears that where a legislature has gone further, and specifically declared that a court shall be 'always open' for the transaction of particular business, and that, so far as that particular business is concerned, the terms of the courts shall be practically continuous and without any vacations between them, the power of the legislature to do so, and to make the acts and proceedings of a judge in pursuance of his authority the acts and proceedings of the court itself, has never been denied by any court where these questions have been presented for its consideration. A reason for such legislation by Congress exists in the fact that judicial power, under the Federal Constitution, is vested in courts only. The power to ordain and establish inferior courts is vested in Congress, and it, accordingly, regulates the scope and boundaries of their jurisdiction, prescribes the number of the judges by whom they shall be held, and determines generally the conditions under which the judicial power that is vested in them shall be exercised. It fixes the time and place for holding regular terms of the courts, and it authorizes the courts or the judges to fix the time and place for holding special terms of the courts; and *it authorizes the courts to sit in chambers for the transaction of an im-*

portant part of their business whenever and wherever they deem it necessary or proper to do so (Rev. St., sections 572, 574, 576, 581, 638, 661, 664, 666, 668–670, 4973, and act Feb. 4, 1887, sec. 16). A single judge may hold a court, and exercise the judicial power that is vested in it, under the conditions that are prescribed by Congress. But, whenever judicial power is exercised by a judge in accordance with these conditions, it is exercised by him as a court, or it is unauthorized by any constitutional authority. His acts in the exercise of judicial power are, in short either acts of a court, or they are absolutely void."

APPROVAL OF THE DISTRICT COURT.

As a final and conclusive proof that the court was open and held during the term on the dates for which the per diems are claimed, that business was transacted in court, and that the clerk was in actual attendance on said court, attention is called to the fact that the account of claimant containing these per diems was presented in open court with the same district judge presiding, in the presence of the district attorney, who represented the Government, and with his consent an order was duly made approving said account as being *just and according to law,* and the same was entered of record.

In United States *vs.* Jones, 134 U. S., 483, the Supreme Court held that "the approval of a commissioner's account by a circuit court of the United States under the act of February 22, 1875 (18 Stats., 333), was *prima facie* evidence of the correctness of the items of said account, and in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive."

This doctrine was affirmed in U. S. *vs.* Nix, 189 U. S., 206, where the court say:

"We adhere to that view. It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute."

Counsel for appellant in his brief is in error when he asserts that all the claimant did was to refer the petitions to the referee as a matter of course, and he would have the court infer that the claimant simply pulled out the petitions from the files of the court and sent them to the referee by mail or messenger.

This is not the fact, as the proof shows, nor is it in compliance with the bankruptcy law and the rules of the Supreme Court prescribed for such proceedings, which require that the reference shall be done by *order of court, duly entered on its records according to the practice of the court.* The proceeding is both judicial and clerical, but both are separate and necessary. These facts constitute business transacted in court, which is always open and on which the clerk was actually and necessarily in attendance, and, in consequence, legally entitled to his per diem for attendance thereon.

Authorities relied on:

U. S. *vs.* Jones, 134 U. S., 483.
U. S. *vs.* Finnell, 185 U. S., 236.
U. S. *vs.* Nix, 189 U. S., 206.
Butler *vs.* U. S., 87 Fed. Rep., 658.
Owen *vs.* U. S., 41 Ct. Cls., 69.

On all the facts and the law of the case, it is submitted that this appeal should be denied and the judgment affirmed.

CHARLES C. LANCASTER,
Counsel for Appellee.

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No. 437 to 444 incl

No

Records

or

Briefs

UNITED STATES v. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

No. 436. Submitted January 7, 1909.—Decided February 1, 1909.

The bankruptcy court of the United States is always open for the transaction of business whether the judge be personally present or not; and, under §§ 574, 638, 828, Rev. Stat., and chap. II, § 2, of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 545, clerks of the United States courts are entitled to the *per diem* compensation for those days on which voluntary petitions in bankruptcy are referred to the referee during the absence of the judge. *United States* v. *Finnell*, 185 U. S. 236, followed; *Owen* v. *United States*, 41 C. Cl. 69, approved.
42 C. Cl. 542, affirmed.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford, Attorney*, for the United States.

Mr. Charles C. Lancaster for appellee.

PER CURIAM: This suit was brought to recover the sum of $535, "for services rendered on behalf of the United States from June, 1900, to April 1, 1906, to wit: For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by §§ 574, 638 and 828, Rev. Stat., and chapter II, § 2, Bankruptcy Act (30 Stat. L. 545), 107 days at $5.00 per day."

The Court of Claims filed its findings of fact and conclusion of law April 20, 1908, as follows:

"*Findings of fact.*

"I. During the times hereinafter mentioned the claimant,

Edwin E. Marvin, was clerk of the District and Circuit Courts of the United States for the District of Connecticut.

"II. For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in Finding III was refused.

"III. Said items, the payment of which was so refused, were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at $5.00 per day, making $535.

"The business so transacted was the reference by the clerk to the referee of voluntary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders or decrees were received from the judge sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which *per diems* are claimed. The claimant, after learning of the decision of the Court of Claims in the *Owen case* (41 C. Cls. R. 69), went back in his District Court journal and on the last day of every month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

"*Conclusion of law.*

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that, under the *Owen case* (41 C. Cls. R. 69),

and the *Finnell case* (185 U. S. 236), the claimant is entitled to a judgment for five hundred and thirty-five dollars ($535)."

And entered judgment without an opinion. 42 Ct. Cls. 542.

The case was brought here by appeal and submitted on printed arguments.

Counsel for appellee referred to a certified copy of the order of court approving the account referred to in Finding II, stating that it was attached to the account of claimant now on file in the Court of Claims. That order contains, among other things, "It is hereby certified that upon each day for which a *per diem* is charged in this account the court was opened for business and court business transacted in bankruptcy matters as stated."

The Government objects on the ground that the order is not set forth in the findings, and moreover that the paragraph is of no effect, "because in the nature of a statement of a conclusion of law."

The various applicable statutory provisions will be found in *United States* v. *Finnell*, 185 U. S. 236, and in *Owen* v. *United States*, 41 Ct. Cls. 69.

We concur with the Court of Claims that the two cases cited govern the disposition of this case, and, accordingly, affirm the judgment.